Supreme Court, U.S.
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No. 02-403

In the

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. § 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise.[1]

PLF has litigated on behalf of First Amendment speech rights in the contexts of campaign speech, corporate speech, and expressive associations. *See, e.g., Nike v. Kasky*, Supreme Court Docket No. 02-575; *Board of Regents, University of Wisconsin v. Southworth*, 529 U.S. 217 (2000); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and *First National Bank v. Bellotti*, 435 U.S. 765 (1978)).

PLF believes that the First Amendment prohibits government regulation of speech–be it political or commercial, by individuals, associations, or corporations–unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

value to our democratic society and should not be treated as a malignancy that the body politic rejects.

STATEMENT OF THE CASE

In 1986, this Court held that not-for-profit ideological corporations posed no threat of corruption to the electoral system. Therefore, they must be exempted from a federal corporate independent expenditure ban. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*). To qualify for this *MCFL* exemption, corporations must: (1) promote political ideas and not engage in business activities; (2) not have shareholders or other persons with a claim on their assets or earnings; and (3) not be established by for-profit corporations or labor unions, and refuse contributions from those entities. *Id.* at 263-64.

The plaintiffs in this case, the not-for-profit advocacy organization North Carolina Right to Life, Inc. (NCRL) and its officers, argued that the FEC-enforced ban on corporate contributions violated their First Amendment right to free speech. The Fourth Circuit held that the *MCFL* rationale for declaring the ban on expenditures unconstitutional applied with equal force to contributions to candidates. Petitioner's Appendix (Pet. App.) 25a. The court held that because not-for-profit ideological corporations pose no corruption threat, then nothing justified prohibiting them from also making contributions. *Id.* Requiring them to do so through political action committees (PACs) was not a viable option because the paperwork and reporting requirements "could effectively cripple small, nonprofit advocacy groups that may have few or no ties to the world inhabited by for-profit corporations." Pet. App. 28a. The court concluded that any "congressional interest in minimizing corruption" was adequately addressed by the $1,000 limitation on contributions to a candidate. *Id.* The court below declined to find Section 441b facially unconstitutional, limiting its ruling only to the ban as applied to NCRL. Pet.

App. 30a-32a. The Federal Election Commission (FEC) petitioned for a writ of certiorari, which was granted.

SUMMARY OF ARGUMENT

The intersection of this Court's jurisprudence regarding the regulation of political speech during election campaigns and its jurisprudence reflecting wariness of corporate participants in the market of ideas has created an untenable situation in which First Amendment rights are based on fine distinctions applied on an almost ad hoc basis.

There are distinctions between contributions and expenditures (*Buckley v. Valeo*, 424 U.S. 1 (1976)); between contributions to candidates and to ballot propositions (*Bellotti*); between individuals and corporations *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*)); between business interests and "advocacy groups" (*MCFL*); and between small advocacy groups and large ones (*Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). In the 26 years since *Buckley*, the distinctions have grown more numerous and more fine. The parsing and hairsplitting has rendered this area of the law a patchwork of contradictory opinions impacting political speech rights at the core of the First Amendment. Relatively early on, Justice White noted that *Buckley*'s distinction between contributions and independent expenditures had caused the Federal Election Campaign Act's regulations to become a "nonsensical, loopholeridden patchwork." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (*NCPAC*). This situation has only grown worse.

In this case, the court below distinguished NCRL as a small not-for-profit issue-oriented corporation to hold that it poses no threat of corruption to the political process and therefore may exercise its First Amendment right to contribute money to a political candidate who shares its views on matters of critical public interest. PLF believes that the court below

correctly decided the matter before it and urges this Court to affirm that decision. Moreover, PLF urges this Court to reconsider the jurisprudence that requires courts to resort to the type of distinctions present in this case. A decision that reduces the need for the seemingly endless parade of distinctions would restore much needed clarity and certainty to the law. To this end, PLF urges the court to (1) restore "actual quid pro quo" corruption as the sole justification for restricting political speech rights, and (2) acknowledge the value of corporate participation in public debates, including debates during the course of elections.

ARGUMENT

I

RESTRICTIONS ON CORE POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY ACTUAL EVIDENCE OF *QUID PRO QUO* CORRUPTION

This Court has held that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." *Buckley*, 424 U.S. at 14, 22. Therefore, burdens on contributions may be sustained only if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000) (affirming standard of review articulated in *Buckley* in assessing the validity of a Missouri state law imposing a limit on political contributions). *Buckley* held that "the prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for a limit on contributions. *Buckley*, 424 U.S. at 25-27; *see also NCPAC*, 470 U.S. at 496-97.

This Court usually defers to Congress's judgment that corporate political speech is of a type more prone to actual corruption and the appearance of corruption, thus justifying

greater regulation than it would countenance for individuals. *See, e.g., NRWC*, 459 U.S. at 210; *NCPAC*, 470 U.S. at 497. The Fourth Circuit declined to apply such deference when the facts–and the fundamental speech rights involved–demanded closer scrutiny. Pet. App. 24a. The court below acted properly, came to the correct result, and this Court could simply adopt the reasoning of the Fourth Circuit to affirm. Lower courts would be better served, however, if this Court went further to cut through the morass of often-contradictory case law attempting to define the type of "corruption" that is necessary to justify regulation of campaign contributions.

In the aftermath of Watergate, the Court was concerned about corruption, election law abuses, and the public's subsequent loss of faith in government. *Buckley*, 424 U.S. at 27 n.28. The *Buckley* Court presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 18 and n.84 (2001) (*Incorporating Corporate Governance*).[2] This

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[2] The Supreme Court's distinctions between contributions or expenditures based on the amount of corruption each was supposed to engender was controversial from inception. In *Buckley*, Chief Justice Burger stated that "contributions and expenditures are two sides of the same First Amendment coin," 424 U.S. at 241 (Burger, C.J. concurring and dissenting), because both types of political disbursements had sufficient communicative content to require that laws infringing on either be struck down. *Id.* at 244. Justice Blackmun also dissented in *Buckley* on this point, finding no "principled constitutional distinction between the contribution limitations . . . and the expenditure limitations." *Id.* at 290 (Blackmun, J., concurring and dissenting). The distinction remained controversial in the post-*Buckley* cases, and was summed up by Justice Thomas in *Colorado Republican Federal Campaign*

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presumption allowed the Court to elude questions as to the amount and kind of evidence required to support an allegation of corruption or the appearance of corruption. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Laws*, 18 Rev. Litig. 85, 98-99 (1999). Although this stance left the lower courts to struggle with the question of evidence, this Court declined to clarify the point in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377. Acknowledging that *Buckley* lacked "precision," *id.* at 386, the Court nonetheless found that *Nixon* "does not present a close call requiring further definition." *Id.* at 393.

The malleability of the concept of "corruption" resulted in a much more expansive definition in *Austin*, 494 U.S. 652. In that case, "corruption" was supplanted by the even more loosely defined phrase, "corrosive and distorting effects." *Id.* at 660. This latter definition expanded the compelling state interest well beyond the *quid pro quo* interest identified only 16 years before. Under *Austin*'s definition of corruption, courts cannot easily discern whether regulation is an intended attempt to purge corruption from politics (permissible) or whether the regulation is an attempt to equalize influence (impermissible). *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 851

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[2](...continued)
Committee v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., concurring and dissenting):

> The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy.

(1985) (describing corruption as "an 'essentially contested concept,' that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible"). Once corruption is perceived beyond the relationship between the contributor and the candidate, the entire electoral process is implicated. "Within this enlarged framework, legislative intent may more easily expand from the eradication of a particular evil, to the eradication of a larger class of evils, and even to the effectuation of some model of a greater good." Miriam Cytryn, *Comment: Defining the Specter of Corruption: Austin v. Michigan State Chamber of Commerce*, 57 Brooklyn L. Rev. 903, 936-37 (1991) (*Defining the Specter*). Under the *Austin* standard, questions of evidence largely disappeared. After all, if public opinion polls suggest a significant agreement with the premise that "special interest groups" or "corporate" money has a corrosive impact on the political process, then the government can freely regulate speech rights.[3] This does a disservice to the Constitution.

> [I]n no other case of speech regulation has the Court been willing to accept evidence of public perception of a compelling interest, rather than existence of the interest itself, to justify restrictions on expression. To pander to public perceptions, regardless of their accuracy, is to paternalistically resign oneself to the public's ignorance.

Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783, 815

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[3] Public opinion polls have achieved some legitimacy as a benchmark of constitutional validity. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249 n.21 (2002) (reliance on polling data as evidence of a widespread consensus among Americans that executing the mentally retarded is wrong).

(2001); *see also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 589, 617-29 (1991) (arguing that *Austin* is an unjustified departure from precedent because it redefines corruption as unfairness instead of the appearance or actuality of bribery and this redefinition seems to justify legislative efforts to equalize speech by restricting the voices of certain speakers).

The problem reached its apex in *Nixon*, 528 U.S. at 394-95. There, this Court accepted as proof of corruption or its appearance documentation that would not even meet the basic rules of admissibility in a federal trial court. One piece of evidence was a single affidavit from a state legislator who averred that large contributions posed a serious threat to officeholder integrity. *Id.* at 393.[4] The Court also based its decision on a series of newspaper articles reporting on scandals involving elected officials. *Id.*[5] This was a markedly different

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[4] *See, e.g., Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (court will not consider "conclusory and self-serving affidavits"); *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir.), *cert. denied*, 528 U.S. 986 (1999) ([S]tatements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement [for admissibility]."). *Cf. First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968) (The evidence presented on summary judgment cannot consist of conclusory allegations or legal conclusions.).

[5] *Cf. Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1993) (newspaper account that Mr. Doe lied in his testimony before a Senate Committee is not admissible in a perjury prosecution of Mr. Doe); *May v. Cooperman*, 780 F.2d 240, 263 (3d Cir. 1985):

> newspaper reports are of dubious validity. On the basis of the record, we do not know *anything* about the reliability of the articles; perception, memory, narration, and misrepresentation all

(continued...)

approach than the Court had taken in *NCPAC*, 470 U.S. at 499-500, holding that newspaper articles and public opinion polls were insufficient to challenge groups making independent expenditures advocating the election of a President.

Professor Ronald Levin identifies at least three problems with the Court's reliance on public perceptions of corruption rather than evidence of actual corruption: First, it "invites regulation on too indiscriminate a basis." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 177 (2001) (*Fighting the Appearance*). In rough-and-tumble politics, accusations of wrongdoing are flung at any and all candidates. All fundraising efforts result in accusations that the candidates are beholden to special interests.[6]

> We have to strike a balance between the restrictions we need to keep the system honest and the latitude

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[5](...continued)

> present potential problems. The reporters may have been present for only part of the hearings they reported, and may not correctly have remembered or interpreted the speeches they heard. They may have simply recorded their impressions of the hearings, in which case the clippings would provide only very slender evidence of legislative intent. We have no idea of the amount of editorializing that went into the articles, which could have been written from a biased point of view. It is not unknown for reporters to stretch some facts or omit others in order to arouse public indignation.

[6] Even the candidacy of multimillionaire Steve Forbes was not exempt from this charge. Commenting on Forbes' $1,000 a plate fund raising event, Charles Lewis, author of The Buying of the President, said: "Forbes is a millionaire who says he's not beholden to special interests who is now beholden to special interests." Richard Lacayo, Jeffrey H. Birnbaum, and Washington and Charlotte Faltermayer, *Rich Man's Game; Forbes Shows the Power of Money in Politics. Should we Change the Rules?*, Time Magazine, Jan. 29, 1996, at 28.

> we need if political discussion is to go forward. So, if we want to regulate any particular aspect of the system, we should ask whether it is a point in the system where restriction will do the most good and the least harm. The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed.

Id. This shift in focus allows legislators a stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content based regulation. Cytryn, *Defining the Specter of Corruption*, *supra* at 949-50. Second, reliance on public perceptions means that advocates of "reform" can make wide-ranging accusations of corruption, and then rely on the fact that some people believe the charges as a reason to justify regulation. Levin, *Fighting the Appearance*, *supra* at 178. Third, if perceptions of corruption suffice to impose greater regulation, the "reformers" will then simply have more occasions for accusations of noncompliance. The readiness of the campaign finance watchdogs to cry "corruption!" means that candidates and their campaign staff members who make judgment calls on debatable issues will be under a microscopic scrutiny; this is an untenable situation in real life. *Id.*[7] This Court should require evidence of actual *quid pro quo* corruption to justify infringement on core political First Amendment rights, rather than permit reliance on "gossip and newspaper citations." Robert F. Bauer,

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[7] California's Fair Political Practices Commission (FPPC) reports that it opened 770 enforcement actions in 2001 alone. FPPC, Annual Report 2001 at 7 (http://www.fppc.ca.gov/pdf/-2001AnnualReport.pdf) (visited Jan. 30, 2003). Moreover, the Commission contacted more than 800 campaign committees alleging possible violations; only 77 were found to have actually violated the law. *Id.* at 12.

Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives, 51 Cath. U.L. Rev. 741, 758 (2002).

Moreover, there is no evidence that corporations–as a identifiable group–are corrupt or introduce corruption into the political process, at least to any greater degree than individuals.[8] Despite research intended to demonstrate that corporations exert considerable influence in ballot campaigns, *see, e.g.*, Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 542-47 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377, 391-406 (1985), the many and varied intangibles influencing any election make it extremely difficult to identify a specific causal relationship between contributions and electoral or legislative events. "How can one prove that voters were

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[8] The Court should be careful to distinguish corruption from legitimately effective and persuasive speech.

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Bellotti, 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). Even so, corporate contributions cannot guarantee legislation favorable to business interests. The social welfare programs of the New Deal and Great Society, and the current expanding federal regulation of the tobacco and drug industries, were enacted over the objections of corporate America. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 247 (1998) (*General Motors*).

overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other side?" Adam Winkler, *Election Law as its Own Field of Study: the Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1248 (1999). The Court should move away from the amorphous standard of "potential corruption" alleged without evidence and demand an evidentiary showing of actual corruption before permitting the government to silence political speech.

II

CORPORATE SPEECH ADDS VALUE TO A DEMOCRATIC SOCIETY

> The First Amendment is first and foremost a denial of government power. It is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the land. It leaves to each of us the choice of what and how to communicate and whether to communicate at all. There exists no lawful "preferred" mix of ideas, no required speech or disallowed speech. No free speech and press model is mandated by the First Amendment. Rather, each model is descriptive of that government-free environment mandated by the First Amendment.

Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (Sept. 23, 1991) (http://www.cato.org/pubs/pas/pa-161.html) (visited Jan. 30, 2003). Expressive associations have a long-standing, constitutionally protected role as part of the political process. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). Corporations are one form of expressive association. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities*

Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations . . . contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster."). The Court acknowledges this for media corporations, *Austin*, 494 U.S. at 667, but then makes an inappropriate content-based distinction to give other types of corporations lesser protection. *Id.* Corporations are not an alien force requiring a barrier to protect the political process from its influence. The open political process of a democratic society is the clash of all sorts of different viewpoints, many driven by economic interests and many driven by noneconomic interests. To allow entrenched politicians to pick and choose which among the disparate interests will be hobbled is antidemocratic. The fact that private associations have been a dynamic and sometimes positive influence on politics over our nation's history does not mean that modern economic organizations are not. *See Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) ("Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.").

Free speech adds three types of value to society: First, free speech bolsters the pursuit of truth. Second, free speech provides a check on other sources of power, thus supporting a stable, progressive, uncorrupt, and responsive democratic government. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Third, free speech serves values of self-realization, personal and cultural development, autonomy, and autonomous decision-making. R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335, 337-38 (2001). Accordingly, the First Amendment guarantees that citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem

desirable. Lillian R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, Cato Policy Analysis No. 282 (Sept. 4, 1997) (citing *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958)). They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts. *Id.* (citing *Hague v. CIO*, 307 U.S. 496 (1939)).

In *Austin* and *MCFL*, the Court suggested that election-related spending by business corporations is somehow less deserving of protection than speech by individuals or political organizations, *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257, but this premise is inconsistent with the earlier ruling in *Buckley* in two ways: First, by justifying regulation with the lack of public support for corporate views, the Court contradicted the central and longstanding *Buckley* rule against the equalization of relative voices, *Austin*, 494 U.S. at 659, even while purporting to leave it in place. *Id.* at 659-60. Second, *Austin* relied on the grant theory (that a corporation is nothing more than an artifice granted certain benefits by the state) in basing its ruling on the special privileges of corporations. *Id.* at 659. This reasoning is not only conclusory, but also raises a troubling implication that incorporation is predicated on unconstitutional conditions. Joo, *Incorporating Corporate Governance*, *supra* at 80; *see also Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968) (public school teacher's employment cannot be conditioned on refraining to engage in otherwise constitutional speech).

Corporations add to societal values in numerous ways. Corporations can also give money to organizations having no relation to their business. There is a spectrum of causes for the public good to which corporations contribute with little or no unique self- or class-interest. They are significant underwriters of charitable and cultural activities. For example, Consolidated Edison in New York supports a diverse assortment of

charitable, public health, environmental, and cultural organizations: American Museum of Natural History; American Red Cross; Arts & Business Council; Brooklyn Philharmonic; Channel Thirteen; Cooper Union; Fresh Air Fund; Manhattan College; New York Blood Center; New York Botanical Garden; New York Hall of Science; New York Public Library; Queens Theatre in the Park; United Way; Wildlife Conservation Society; and the YMCA. *See* Consolidated Edison website, http://www.coned.com/partnerships/news_highlights.html (visited Jan. 30, 2003).

Moreover, corporations play an important role in diffusing and checking societal and governmental accumulations of power. David Millon, *The Sherman Act and the Balance of Power*, 61 So. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society."). For example, the Pharmaceutical Research and Manufacturers Association (PhRMA) provides expert testimony before Congress and the Food and Drug Administration relating to pending legislation that impacts the availability and cost of pharmaceuticals. *See generally* www.phrma.org (press releases describing testimony and comments to agencies). Viewed in this light, governmental suppression of corporate speech takes on

> potentially ominous implications for avoiding political power's centralization. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority. Hence, excluding corporate speech from the First Amendment's reach would almost inevitably have a detrimental impact on the most

> _fundamental values underlying the protection of free speech.

Redish, *General Motors*, *supra* at 264.

A message's overall nature may change when the messenger changes; similarly, the degree of effectiveness and credibility may change depending on the source. *See Bellotti*, 435 U.S. at 791-92 (stating that the people in a democracy "may consider . . . the source and credibility of the advocate"); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 65 ("Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech."). The same statement from different speakers may constitute a different message. As the Court has noted, an "espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or on an ambulatory sandwich board." *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994); Redish, *General Motors*, *supra* at 257. Corporate speech thus provides both a message and a messenger of value to the bustling market of ideas.

A. Economic Wealth Is Not a Reason to Deny Free Speech Protection

Attempting to regulate corporate participation out of the public debate reflects a profound, patronizing distrust of the American people. Reformers argue that "political competition will not be as free and robust as it should be . . . because irrelevant (or even pernicious) victories in the economic marketplace will squelch the ability of nonaffluent individuals or groups to participate effectively." Pamela S. Karlan, *Politics by Other Means,* 85 Va. L. Rev. 1697, 1702 (1999). However, this argument is inconsistent with First Amendment values on several levels. First, wealth certainly amplifies speech, but corporations are far from the only speakers that can accumulate wealth. For example, wealthy celebrities frequently speak out

on political matters.[9] They can afford to purchase full-page advertisements in the New York Times[10] or other national publications to promote their views. Celebrities also endorse candidates. *See e.g.*, Donald J. Ward, *Celebrities Endorse Gore at Gas Works Rally*, The Daily (U. Wash.) (Oct. 30, 2000) (http://archives.thedaily.washington.edu/2000/103000/news.html) (visited Jan. 29, 2003) (noting appearances by Martin Sheen, Alfre Woodard, Rob Reiner and Christine Lahti). While some may question their expertise, no one doubts that the First Amendment forbids the government from interfering with their right to express political opinions in this way.

Other repositories of wealth abound. Individuals grow rich from various enterprises and use their wealth to promote certain views of the public welfare. *See* Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 Tul. J. Int'l & Comp. L. 5, 61-62 (2001). This may include taking sides during an election. Indeed, it may include *standing* for election, as in the cases of successful candidates Jon Corzine (Senate) and Michael Bloomberg (mayor of New York City) or unsuccessful presidential aspirants Steve Forbes and Ross Perot. In some cases, it is difficult to separate the interests of the owners of a

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[9] Singer Sheryl Crow, actress Susan Sarandon, and others made the news recently for their outspoken opposition to war in Iraq. *See, e.g.*, Diana West, *Sheryl Crow*, Washington Times (Jan. 24, 2003); Reuters, *100 Celebrities Sign Letter Opposing War in Iraq* (Dec. 9, 2002) (http://www.abcnews.go.com/wire/US/reuters20021209_532.html) (visited Jan. 29, 2003).

[10] *See, e.g.*, Rainforest Action Network, *Press Release: Celebrity -Endorsed Ad in Today's New York Times Condemns Boise Cascade's Destructive Logging, Free Speech Attacks* (Sept. 7, 2001) (http://www.ran.org/news/newsitem.php?id=422) (visited Jan. 29, 2003).

company from the company itself. For example, Bill Gates is inextricably linked with Microsoft and one might reasonably presume that what benefits Microsoft benefits Bill Gates. *See* John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 Yale L. J. 293, 305 (2000) (Microsoft contributed $798,163 in soft money and Bill Gates contributed $1,000 per candidate in 1999.). Ben Cohen and Jerry Greenfield are known by their politically-oriented ice cream business and benefit from the self-realization function of free speech whether their names on the check include Cohen and Greenfield, or simply "Ben and Jerry's."[11]

Even when the names of business owners are unknown, their wealth derived from corporate success makes possible their own political speech. For example, according to the Center for Responsive Politics, the top individual contributor to 2002 campaigns was Haim Saban who gave over $9 million to Democratic candidates. Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Individual Contributors* (http://www.opensecrets.org/overview/topindivs.asp?cycle=2002) (visited Jan. 24, 2003). Meanwhile, the top overall donor was Saban Entertainment, which gave almost $11 million to Democrats. Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Overall Donors* (http://www.opensecrets.org/overview/topcontribs.asp?cycle=2002) (visited Jan. 24, 2003). One might reasonably suppose that what Haim Saban believes benefits his company (and the company's shareholders) also benefits himself personally. Finally, wealth is not a reliable indicator of a particular point of view. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable*

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[11] Although acquired by Unilever in 2001, Ben and Jerry's remains committed to a variety of social causes, including global warming and overseas labor conditions. Ben and Jerry's Social Performance Audit 2001, Social Auditor's Letter to Stakeholders of Ben and Jerry's (http://www.benjerry.com/socialmission/01socialaudit/letter01.html) (visited Jan. 30, 2003).

Dilemmas, 94 Colum. L. Rev. 1258, 1269 (1994). Ted Turner and Barbra Streisand on the Left are countered by Rupert Murdoch and Charlton Heston on the Right.

> Egalitarianism is not a good reason for curtailing corporate political speech but not the political speech of wealthy individuals or other unincorporated business entities. Indeed, discriminating against corporate political speech might be anti-egalitarian, because it would take away from individuals the ability to organize in a form that would allow them to engage efficiently in collective action.

Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1110-11 (2002) (*Corporate Political Speech*).

B. Self-Interest Is Not a Reason to Deny First Amendment Protection

Most, if not all, speakers have some self-interest, whether financial or personal, in having their views accepted by their audience. This self-interest does not diminish the First Amendment protection sheltering "political candidates seeking elective office, consumer organizations seeking increased consumer protection, welfare recipients seeking increases in benefits, farmers seeking subsidies, and American auto workers seeking higher tariffs on foreign automobiles." Redish, *General Motors*, *supra* at 269-70. Instead, First Amendment values of truth-seeking and democratic participation are advanced when the substance of the debate contains elements from all interested parties. The simple fact that all sides of a debate can participate is "likely to spur expression's thoroughness, thoughtfulness, and breadth of distribution. To exclude all self-interested expression from the scope of the constitutional guarantee, then, would effectively gut free speech protection." *Id.*

Despite "reformer's" concerns that people must be protected from self-interested corporate speech, it would seem that the people are not only quite capable of looking out for their own interests, but are also capable of organizing counter-speech to corporate communications. Frequently, this takes the form of boycotts. *See, e.g.*, CNN, *Environmental Campaigners Take Aim at Oil Companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe-/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29, 2003) (Greenpeace, Friends of the Earth, People and Planet, and the World Wildlife Fund urge boycott of Exxon and other oil companies, specifically identifying their action as a response to corporate political contributions); Jenny Strasburg, *Ban on Israeli Goods Has Shoppers in Uproar: Some Demand Rainbow Co-op End Boycott*, San Francisco Chronicle, Dec. 5, 2002, at B-1 (grocery store's boycott of Israeli products led to counter-boycott by local Jewish community). Boycotting is such a popular response to corporate speech that an organization called "Boycott Watch" was established in 2000 to keep track of all the major boycott actions. *See* www.boycottwatch.org. Thus, those who hear corporate speech have demonstrated their ability to consider the source as a factor in calculating the worth of the speech.

C. "Disincentives to Disassociate" Are Not a Reason to Deny First Amendment Protection

Corporations derive their wealth in two ways: from customers purchasing the corporate product, and from shareholder investments. Customers who disagree with the political leanings of corporate speech can simply refuse to purchase the companies' products. The Court's concerns about speaking with "someone else's money" is logically related only to corporate wealth derived from shareholders. "Customer money . . . is not accumulated with the help of the corporate form. Customers of a business often do not know whether they are dealing with corporation, partnership, or sole proprietorship.

Indeed, the business association's form is irrelevant to its ability to attract customers and sell services or products." Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 158 (1998). The impact of corporate speech on minority shareholders raises additional questions. This Court has shown a varying amount of deference to the notion that shareholders need protection from corporate expressive activity in the political realm. In *Bellotti*, the Court placed little weight on this interest in restricting corporate political spending to protect shareholders when the shareholders are able to pursue their own remedies within the corporate structure or through derivative shareholder suits. *Bellotti*, 435 U.S. at 794 ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."). Yet the desire to protect "members" of a corporation without capital stock was held to justify the regulations of section 441b when those "members" contributed money to the corporation but had no decision-making authority within the corporation. *NRWC*, 459 U.S. at 206-08.[12]

Tacking back the other direction, the Court in *NCPAC* and *MCFL* downplayed the interest in protecting shareholders when the political nature of the corporation itself makes it likely that its members will support the focus of that corporation's political expenditures. *NCPAC*, 470 U.S. at 495 (Contributors to politically oriented organizations "obviously like the message they are hearing from these organizations . . . otherwise they would not part with their money."); *MCFL*, 479 U.S. at 259 ("The resources [MCFL] has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."). Thus, Congress's interest in protecting

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[12] The National Right to Work Committee's solicitations for donations urged potential donors to become "members" of the organization. However, the corporate bylaws specifically disclaimed the existence of "members," and there were no membership meetings or any other functions of "membership." *NRWC*, 459 U.S. at 206.

the members of organizations regulated under section 441b is less compelling when mechanisms other than campaign finance laws (such as the structure of the corporate decision-making process and the dependence of the popularity of the corporation's political views to attract funding) ensure that the political views expressed by a corporation's expenditures will match the views of its members. Adam P. Hall, *Note, Regulating Corporate "Speech" in Public Elections*, 39 Case W. Res. 1313, 1318 (1989).

The Court has worried that shareholders' "disincentives to disassociate" from a for-profit corporation are so overwhelming as to implicate the shareholders' First Amendment rights *not* to associate with expressive activity. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977). However, this fear doesn't make sense as a constitutional principle in the context of corporate stock ownership because it is overbroad.[13] Reinvesting one's holdings in a politically compatible corporation is a difficulty of narrower dimension. Sitkoff, *Corporate Political Speech*, *supra* at 1119 (noting proliferation of "social responsibility" funds, assuring investors that their money will not be invested in corporations engaged in certain

[13] There is another inherent contradiction in the court's concern about shareholders disincentive to disassociate for corporations in general, but the utter lack of such concern for shareholders in media corporations. The past ten years have seen mega-mergers producing powerful media conglomerates that are in the portfolios of many mutual funds, pension plans, and individual shareholders. *See, e.g.*, Winkler, *Beyond Bellotti*, *supra* at 190-91 (noting that media empires include significant holdings in real estate, utilities, advertising companies, manufacturing, telecommunications, financing, transportation, sports franchises, retail enterprises, and a host of other industries and businesses). These media corporations have greater speech rights than other types of corporations, despite the Court's protestations in other contexts that the freedom of the press is no greater than any other individuals' right to free speech. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974).

specific forms of behavior, such as the sale of alcohol or tobacco, military contracting, abortion-related services, and so on). All of life involves trade-offs. This is not like the compelled speech cases, in which the state *mandates* contributions subsequently used for expressive purposes. Corporate treasuries serve the more generalized purpose of maximizing profits, and corporate managers enjoy considerable discretion in determining what furthers the economic interest of the corporation. *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1368-69 (2002).

Moreover, as Prof. Sitkoff explains, the Court's analysis of economic disincentives to disassociate does not comport with reality.

> The minority shareholder who invests in stock for income, which is the precondition to having an economic disincentive to dissociating, is by hypothesis indifferent between companies with comparable rates of return. He therefore has no reason not to sell his stock in the politically active company and then invest the proceeds in another company that is not politically active. In contrast, the minority shareholder or member of the incorporated nonprofit political association often faces an incentive not to dissociate because of the shortage of alternatives. There is a thick market for corporate securities; the menu of prospective political associations is less robust.

Sitkoff, *Corporate Political Speech*, *supra* at 1120 (citing Larry E. Ribstein, *Corporate Political Speech*, 49 Wash & Lee L. Rev. 109, 137 (1992), and Henry N. Butler and Larry E. Ribstein, *The Corporation and the Constitution* 74-75 (AEI 1995) (discussing the difficulties a member of an ideological group faces in exiting, as opposed to the shareholders in a

corporation). *See also International Assoc. of Machinists & Aerospace Workers v. Federal Election Comm'n*, 678 F.2d 1092, 1118 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982) (shareholder is not legally or practically obliged "to continue his investment, is not compelled to speak in violation of his First Amendment right to remain silent" by a statute permitting corporate political action committees). Therefore, the Court's concerns about "disincentives to disassociate" do not provide a sufficiently compelling reason to deny corporate speech full protection to engage in electoral debates.

CONCLUSION

Upon reviewing the Court's decisions since *Buckley*, Judge Patricia M. Wald presciently questioned whether the rulings "have any real roots in the values enshrined in the first amendment? Do these fine distinctions contribute more to freedom of association or to mass cynicism about how the electoral system works?" Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 757 (1988).

The Court's attempt to graft laws restricting political speech in the name of campaign finance reform has seen our precious free speech rights moving further from the strong trunk at the center of the First Amendment to a precarious balance on the outermost branches and leaves. Currently, the law of campaign finance exists mostly as a series of distinctions in which the First Amendment protection of free speech grows ever more attenuated.

In its decision below, the court rescued a small, not-for-profit advocacy organization from its precarious perch on a small branch and acknowledged that their speech was fully

deserving of the shelter of the First Amendment. At the very least, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

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